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No. [redacted]

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IN THE

Supreme Court of the United States

ELIZABETH RASK,

Petitioner,

v.

FRESENIUS MEDICAL CARE
NORTH AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

A. Respondent Argues Disputed Facts And Largely Avoids The Issues Raised In The Petition

As this case wound its way through the court system to its highest tribunal, one common engine drove respondent's arguments along the way: the notion that respondent's facts were the only facts, no matter what else the record had to offer. From the extraordinary (and irrelevant) effort to argue to this Court who the employer was (BMA v. Fresenius -- a long dead issue), to its continued denial of what petitioner's supervisors knew of her illness and medications, to its misrepresentation of what petitioner knew of its Family and Medical Leave Act (FMLA) policy and, finally, to its denial of what it told petitioner was the very reason why it fired her – respondent has consistently plunged ahead with presenting as "facts" matters that are disputed by the record evidence.

In its opposition brief, respondent cites to the District Court opinion on summary judgment as its source for some of these disputed facts. The disputed nature of these facts and the District Court's fact finding on summary judgment, however, was the essence of petitioner's initial appeal to the Eighth Circuit. Summary judgment in employment litigation reached a new plateau in this case, one unimagined by the Supreme Court when its trilogy of Rule 56 cases was decided in the mid 1980's. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); Fed. R. Civ. Pro. 56. The District Court engaged in significant fact finding, resolving key disputes against petitioner to reach its ultimate conclusion.[1] The Court of

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[1] For example, the District Court first noted the following testimony from petitioner in its opinion: "According to Rask, she explained why she left

Appeals avoided many of these landmines, but nonetheless read inferences from facts about what respondent knew of petitioner's illness and medication against petitioner and ignored an affidavit from petitioner. When this Court reads the opposition to certiorari filed by respondent, it needs to be aware that the "facts" recited therein were hotly disputed in the courts below.

Respondent's opposition brief simply drags the argument into the world of "he said/she said", something petitioner has contended all along belonged to the realm of a jury and not summary judgment. This petition, however, is about much more than simply a failure to follow Rule 56. It is about a precedent that threatens the family and medical leaves of workers who need time off because of the side effects of treatment and not simply because of the underlying serious health condition. It is also about whether time off from work to see a doctor in the Eighth Circuit is just as much a reasonable accommodation under the Americans with Disabilities Act as it is in other circuits, or whether such time off is not a reasonable accommodation because it "personally benefits" the employee in some way, as the Eighth Circuit erroneously reasoned. These are questions of no small

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[on March 22] and Mitchell [a manager] said, 'this is the first time I've heard about any depression or anything.' (Pet. App. B at 37). The District Court then noted the contrary testimony of Pedersen and Mitchell, stating "Mitchell denied knowledge that Rask was suffering from depression[.]".. Id. The Court then held that "[d]espite the many conversations that Rask had with Pederson [Rask' supervisor] and Mitchell about her attendance and performance, Plaintiff did not mention that she was suffering from depression[.]"(Pet. App. B at 61)(emphasis added). In yet another place in its opinion, the District Court said, "Here, the record overwhelmingly reflects that Rask failed to notify Defendant of her depression[.]" (Pet. App. B at 60). The Court could only have reached this conclusion by accepting Pedersen and Mitchell's testimony and rejecting petitioner's, this on a mere paper record with no trial. The Supreme Court could never have intended such a use for Rule 56 when it decided the trilogy above.

importance to the average worker who could be healthy one day and in need of protected time off to see a doctor the next.

B. Respondent's Argument That The Court Held That Notice Of A Need For FMLA Leave Was Inadequate Because Petitioner Gave Respondent No Link Between The Medications And The Depression Is Factually Wrong, It Requires The Appellate Court To Have Ignored The Affidavit And Deposition Of Petitioner To The Contrary, And It Is An Invitation To Summary Reversal

Contrary to respondent's argument, the appellate court's holding on the sufficiency of the notice provided by petitioner of her need for FMLA leave depended *entirely* on whether the Court included notice of her medication's side effects in the equation. To suggest as respondent has that what the Court really meant to say was that the employer did not know that the medications were for the depression and so the two could not be linked for purposes of notice is not supported by the record.[2]

To reach respondent's conclusion, the Court would had to have ignored entirely petitioner's affidavit to the District Court in which she testified:

> "My depression was generally widely known at Fresenius and was well known to my supervisor Patty Pedersen. We discussed it on many occasions. We also discussed the medications I was taking and that they

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[2] (Resp. Opp. Br at 24)("Without any evidence that Rask notified BMA of a causal connection between her medication side effects and her alleged depression, the Court of Appeals had no basis to treat the two as interrelated concepts within the notice analysis.")

> were for depression. I discussed with Ms. Pedersen how my depression affected my ability to concentrate, that I could not focus or think clearly and that I did not trust myself working with patients when the depression was at its most severe. When I worked at Eveleth there were numerous discussions at work with Ms. Pedersen present about my being on Prozac."

(Appellant's App. to Ct. of Appeals at 95-96)[3]

Petitioner also testified that she told her supervisor on May 28, 2004, just days before her termination: "I talked to Patty and I said, 'Patty, I'm having -- I talked to my doctor and they want me to come in tomorrow, I won't be able to work. I need help with my medication still, I'm still having a lot of side effects from what they put me on.'" (Appendix to Ct. of Appeals at 114 -- Rask depo. at 158).

The explanation of the Court's opinion offered by respondent therefore does not square with the record. To follow respondent's argument, the Court would have ignored the petitioner's record evidence and would have beyond any doubt violated Rule 56. The distinction respondent urges is an admission by respondent of error and is proper grounds for summary reversal by this Court. U.S. Sup. Ct. R.16.1.

Respondent complains that petitioner did not mention the FMLA (Resp. Opp. Br. at 22), nor did she get a doctor's note when she told them of her need to see the doctor (Resp.

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[3] (Cf. Resp. Opp. Br. at 4, fn.2, erroneously claiming that "Rask's assertion that she 'told her supervisor and her supervisor's manager of her depression and her requiring medication for its treatment' is simply not supported by the record.").

Opp. Br. at 5), but neither of these are required by the FMLA. 29 C.F.R. § 825.303(b) ("The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means.")

It was only when the Court of Appeals elected to parse the notice of depression from the notice of the effects of medication for the depression that the notice was held to be inadequate under the FMLA. That is where the Court erred and is where the decision threatens all who are treated for serious health conditions, suffer side effects from the treatment and need FMLA leave to see the doctor to fix the problem.

The issue becomes a jury question only because respondent disputes what petitioner told it. Unless summary judgment law has become so skewed that judges are now free to decide credibility on paper records, this case must be remanded to allow a jury to do what juries do best: decide who to believe.

C. Respondent's Argument That The Court Of Appeals Engaged In A "Fact Specific Analysis" on Petitioner's ADA Claim Requires That The Appellate Court Have Ignored Record Evidence From Petitioner And Would Allow For Summary Reversal By This Court

Respondent presents another argument for summary reversal when it attempts interpretation of the Court of Appeals' holding on the American's with Disabilities Act (ADA) claim. Respondent contends that the Court simply engaged in a "fact specific analysis" to come to the conclusion that there was no duty to reasonably accommodate petitioner's depression by providing her with time off to see

the doctor. (Resp. Opp. Br. at 16-17). If respondent were correct, this "fact specific analysis" would also have had to violate Rule 56 and would be an easy decision for the Supreme Court to summarily reverse.

The undisputed evidence shows that respondent failed to meet its duty to engage in an interactive process with petitioner to determine a reasonable accommodation. The Eighth Circuit has previously acknowledged that, "Under the ADA, an employer must engage in an interactive process to identify potential accommodations that could overcome the employee's limitations. *Burchett v. Target Corp.*, 340 F.3d 510, 517 (8th Cir. 2003. `[T]he failure of an employer to engage in an interactive process to determine whether reasonable accommodations are possible is prima facie evidence that the employer may be acting in bad faith.'" *Cravens v. Blue Cross & Blue Shield of Kansas City*, 214 F.3d 1011, 1021 (8th Cir. 2000) (citation omitted). For the Court of Appeals to have engaged in a "fact specific" analysis, it would had to have ignored the undisputed evidence that respondent failed to engage petitioner in the very fact finding process that the appellate court previously said was required.

The Court would also have had to ignore the following facts of record:

> 1. Respondent had policies allowing for time off, including personal leave time ("PTO"), extended sick leave ("ESL") and FMLA time off. (Appellant's App. to Ct. of Appeals at 139-41). At the time of her termination, petitioner still had 48.5 hours of unused PTO available to her. (Appellant's App. to Ct. of Appeals at

> 86). The policies and the fact that petitioner had time available to her under the policies are prima facie evidence of an ability to accommodate.
>
> 2. Respondent did not replace petitioner for ten months after her termination, indicating that her presence was not so urgently needed as respondent suggests. (Appellant's App. to Ct. of Appeals at 38).
>
> 3. Respondent was overstaffed at the time petitioner requested time off to see her doctor. Respondent admitted this to the Court of Appeals when it argued the following: "She [Rask] knew her unit was overstaffed around the time of her discharge, and admits that a further hours reduction was something BMA 'could have done'[.]" (Resp. Br. to Court of Apps. at 41-42)

In *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401-02 (2002), this Court found that "a plaintiff/employee (to defeat a defendant/employer's motion for summary judgment) need only show that an 'accommodation' seems reasonable on its face, i.e., ordinarily or in the run of cases. . . Once the plaintiff has made this showing, the defendant/employer then must show special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances."

A request for time off to see a doctor to have medications adjusted when a company is overstaffed and an employee has 48.5 hours of PTO time available to her under the company's own policies "seems reasonable on its face".

Barnett, *supra*. Being overstaffed, if respondent was concerned about short notice absences, it could simply have offered an alternative block of time off for petitioner, consistent with its time off policies, to get her medications straightened out. The interactive process discussed earlier allows the employer the opportunity to select the accommodation that works best. By failing to even engage in the process, however, respondent violated the ADA.

What is clear from the record is that respondent at no time offered any actual proof of any undue hardship caused by petitioner's three days of absence to meet its burden of proof under the ADA. Respondent never offered proof of any employees who worked any extra hours or found their shifts more burdened. It offered no proof of any additional expense. It offered only conclusory speculation.

Respondent's claim that the Court of Appeals found as a factual matter that petitioner did not give adequate notice of her disability to respondent sufficient to trigger a duty to reasonably accommodate would again be a basis for error if true. (Resp. Opp. Br. at 11). Respondent bases this argument on the erroneous factual assertion that petitioner never "offer[ed] specific evidence of any conversation in which she advised her supervisors that she had depression that was causally related to her absences." Id. This claim ignores the deposition testimony and affidavit of petitioner recited above in which she testified about those very conversations. (Appellant's App. to Ct. of Appeals at 95-96 – Rask affidavit, and 114 -- Rask depo. at 158). It also ignores the following testimony from petitioner:

> "She [Pederson] knew about my medication management, I was having problems with my medication, I was having side effects from my

> medication, and she knew I was, I was having problems and I needed to get my medication adjusted and she knew I was seeing a doctor about it, I let her know that."

(Appellant's App. to Ct. of Appeals at 109).

> "And then the next time I worked, Chris and Patty had a meeting with me, because they wanted to know why I left that day. And I explained in there and Chris was like, 'Well, this is the first time I've heard about any depression or anything,' and that's because Patty hadn't said nothing to her I guess.
>
> But I just kind of asked and let them know that I'm having problems with my medication and, you know, would you stand by me, I might miss a day here and there because of it, but, you know, I've been here for almost six years with this company, can you stand by me now. And when I left out there, it seemed like yeah, they would, you know.
>
> But the next time I talked to Patty, I called her and I said, "I can't make it, the doctor told me I can't go to work, I need to come in and have my medication redone[.]"

Id. Petitioner was fired a few days later. Id.

The above is beyond doubt a "real world" request for the accommodation of time off to see a doctor to get medications redone. The law imposed no requirement that she put the request in writing as respondent urges, nor was there any elegant form the law required her request to take.

The real issue on certiorari review of the ADA claim is the view by the Eighth Circuit that time off from work is not a reasonable accommodation because it benefits the employee personally. Respondent has no answer for this issue, other than to suggest that the Court must have engaged in fact finding and was not setting a "bright line rule". (Resp. Opp. Br. at 16-19).

If the Court of Appeals truly engaged in a "fact specific analysis" as respondent urges, it would had to have ignored petitioner's record and have viewed respondent's facts in a vacuum devoid of all context. It would had to have made assumptions and drawn inferences unfavorable to petitioner, all of which would be a clear violation of Rule 56 and grounds for summary reversal by this Court.

Respondent's effort to distinguish cases from the other circuits in conflict with this decision is a meaningless effort that completely misses the point. The importance of those cases in comparison to the instant case is that the cited cases recognized that time off can be a reasonable accommodation under the ADA, whereas the instant case holds time off to be a matter that benefits the employee personally and is therefore an unreasonable accommodation.[4]

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[4] Respondent's claim that *Walton v. Mental Health Ass'n. of Southeastern Pennsylvania*, 168 F.3d 661 (3rd Cir. 1999) relied on the same federal ADA regulation as the one at issue in the petition is erroneous and deceptive. *Walton* was not interpreting the regulation respondent quotes it as interpreting. Respondent quotes the text of the regulation that is at issue here (29 C.F.R. Part 1630, App. at §1630.9) but then it incorrectly

It is this latter holding that puts employees in the Eighth Circuit who need time off to see a doctor at an unfair risk of termination of employment, in comparison to the other circuits.

II.

CONCLUSION

Based upon the foregoing, petitioner respectfully requests that the Supreme Court grant her request for a writ of certiorari. In the alternative, petitioner respectfully requests that the Supreme Court summarily reverse the decision of the Eighth Circuit as clearly violating Rule 56 and remand the matter for trial.

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cites it as 29 C.F.R.§§ 1630.2(o)(ii)(iii), which is a completely different regulation. (Resp. Opp. Br. at 14-15). While *Walton* concerned itself with §1630.2(o)(ii)(iii), the regulation relied on by the Eighth Circuit that is at issue here is 29 C.F.R. Part 1630, App. at §1630.9. *See Rask*, 509 F.3d at 470-71 (Pet. App. A at 19-20) *Walton* was not interpreting the same regulation that is at issue in this petition, and to claim that it was is a very misleading error. Note that petitioner had included the text of both regulations in her appendix to the petition. (Cf. Pet. App. D at 68-70 and 73-76).

Respectfully Submitted,

Dated: May 27, 2008.

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